APPEAL NO. 021313
FILED JULY 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 3, 2002. The hearing officer determined the respondent (carrier) did not specifically contest an injury which occurred in the course and scope of employment but sufficiently contested compensability pursuant to Section 409.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.2 (f) (Rule 124.2(f)); that the appellant (claimant) did not sustain a compensable injury on _____; that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his group insurance policy; and that because the claimant did not sustain a compensable injury on _____, he did not have disability. The claimant appealed, arguing that the hearing officer erred in determining the injury, timely notice to his employer, and election of benefits. The carrier responded urging affirmance.

DECISION

Affirmed.

The claimant attached a document to his appeal, which would purportedly show that he sustained the claimed injuries in the course and scope of his employment on _____. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, the evidence offered is not so material that it would probably produce a different result. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

The issues of whether the claimant sustained a compensable injury, whether he timely reported his injury to his employer, whether he made an election of benefits, and whether the claimant had disability were questions of fact for the hearing officer. The hearing officer did not err in determining that the claimant did not sustain a compensable injury on _____. The claimant had the burden to prove that he sustained damage or harm to his neck arising out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. In the present case, the hearing officer determined that the claimant did not sustain a compensable injury in the course and scope of employment on _____. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, the hearing officer's determination is

not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm her determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer did not err in determining that that claimant did not have good cause for failing to timely report to the employer that he sustained a work-related injury within 30 days of _____. Section 409.001 requires that an employee, or a person acting on the employee's behalf, shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether or not an injured worker has good cause for failing to report an injury to his employer within 30 days as is required by Section 409.001 is a question of fact for the hearing officer to resolve. Nothing in our review of the record indicates that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb this determination on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain, *supra*.

As far as election of remedies is concerned, the hearing officer resolved this issue in the claimant's favor and the carrier has not appealed. In addition, the Dallas Court of Appeals has held that the 1989 Act, specifically the subclaimant provisions of Section 409.009, removed election of remedies as a viable argument. Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.). Also, the Appeals Panel has long determined that a claimant's resorting to his private health insurance to pay for medical treatment will not constitute an election under Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). *See* Texas Workers' Compensation Commission Appeal No. 002682, decided December 22, 2000.

Finally, while the claimant asserts in his appeal that the hearing officer prevented the claimant from presenting his case, our review of the record does not indicate this was the case.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDO L
CLAIMS MANAGER
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge